



Craig J. Brown
Suite 250
1099 New York Avenue, N.W.
Washington, DC 20001
Phone 303-992-2503
Facsimile 303-896-1107
craig.j.brown@centurylink.com

Senior Associate General Counsel

VIA ECFS

WRITTEN EX PARTE

October 2, 2015

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services; WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

CenturyLink, Inc. (CenturyLink) hereby submits this letter in the above-captioned proceeding, in response to the August 28, 2015 ex parte submission by Birch Communications, Inc., BT Americas Inc., and Level 3 Communications, LLC (collectively, the Joint CLECs).¹ CenturyLink is both a major provider and large purchaser of business data services, such as DS1s and Ethernet, giving it an expansive view of the rapidly-evolving marketplace for these services. It is from this vantage point that CenturyLink shares its views on the Joint CLECs' August 28 Letter.

In their submission, the Joint CLECs assert that the Commission has virtually limitless authority to impose every conceivable type of wholesale regulation of ILEC business data services, including reversing the Commission's *Enterprise Broadband Forbearance Orders*², eliminating the limited pricing flexibility afforded to DS1 and DS3 services over the past fifteen

¹ See Letter from Thomas Jones, Counsel for Joint CLECs, to Marlene H. Dortch, FCC, *In the Matters of Special Access for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593 (filed Aug. 28, 2015) (August 28 Letter).

² See, e.g., *Petition of AT&T, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007).

years, re-imposing price cap regulation on these ILEC services previously subject to forbearance or pricing flexibility, and reducing price cap rates through current and prospective productivity factors.

Throughout, the August 28 Letter articulates one overriding theme: the Commission has discretion to adopt whatever special access regulation it wants—regardless of the evidence, or lack thereof—as long as it mouths the necessary findings, based on its status as an expert agency. In other words, the Joint CLECs suggest, the results of the special access data collection are secondary: the Commission can and should decide now (before even receiving public comment on the special access data) to impose utility-style regulation on ILEC special access and enterprise broadband services, knowing that it can later construct the justifications necessary to have that decision upheld by a reviewing court.

The Commission should reject the Joint CLECs' cynical arguments, which are both wrong and flatly inconsistent with the Commission's stated intention of employing a data-driven review of its special access regulations.³ While the Commission is of course accorded substantial deference under *Chevron*⁴ and the Administrative Procedure Act, that deference is not unlimited—particularly when the Commission ignores relevant evidence. Indeed, the Joint CLECs acknowledge that the Commission has been reversed multiple times when it has ignored record evidence or concocted arbitrary factors to reduce ILEC rates.⁵ The path laid out by the Joint CLECs will lead to a similar outcome, as well as years of investment-choking regulatory uncertainty.

³ See *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Modified Data Collection Protective Order, DA15-1035 ¶ 2 (Sept. 18, 2015) (identifying data collection as “a critical piece of the evidentiary record necessary for reforming the Commission’s special access rules.”); Statement of Chairman Julius Genachowski, *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (noting that Commission was “launching a detailed data collection to get a comprehensive nationwide picture of the competitive landscape for special access services[.]”)

⁴ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), *reh’g denied*, 468 U.S. 1227 (1984) (*Chevron*).

⁵ See August 28 Letter at 9-10. See also *United States Tel. Ass’n v. FCC*, 188 F.3d 521 (D.C. Cir. 1999) (reversing and remanding Commission’s adoption of a 6 percent X-Factor, based on the “mystifying” and “irrational” logic underlying that factor, as well as the Commission’s inadequate explanation of its reasoning); *United States Tel. Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (finding that Commission’s unbundling rules gave insufficient weight to resulting disincentives for investment and competition from cable providers).

Over the past 15 years, the Commission has gradually reduced regulation of business data services, concurrent with the emergence of competitive alternatives, the development of data services often provided over new, fiber-based networks, and the recognition that such services often generate sufficient revenues for non-ILEC providers to build their own facilities. In 1999, recognizing that there were competitive alternatives to ILEC special access services in at least some areas, the Commission established a mechanism to enable ILECs to offer these services through individually-negotiated contract tariffs if certain competitive triggers were met.⁶ The following year, the Commission adopted the CALLS Plan, which abandoned the Commission's unsuccessful efforts to adopt a judicially sustainable productivity factor, and instead employed a transitional X-Factor ultimately set equal to inflation.⁷ Then, beginning in 2006, the Commission eliminated dominant carrier regulation, on a carrier-by-carrier basis, for ILEC-provided Ethernet and other enterprise broadband services.⁸

In parallel with this measured reduction in regulation, the marketplace for high-capacity data services has become intensely competitive, while shifting to a new generation of enterprise broadband services. Customers of all types and sizes increasingly migrate away from special

⁶ *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, 98-257, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*), *aff'd*, *WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

⁷ *See In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Sixth Report and Order, *Low-Volume Long Distance Users*, CC Docket No. 99-249, Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Eleventh Report and Order, CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*), *aff'd in part and rev'd in part, and remanded in part*, *Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied*, *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002). *National Association of State Utility Consumer Advocates v. FCC*, 535 U.S. 986 (2002); *on remand*, *Access Charge Reform; Price Cap Performance Review for LECs; Low-Volume Long Distance Users; Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249 and 96-45, Order on Remand, 18 FCC Rcd 14976 (2003) (*CALLS Remand Order*).

⁸ *See, e.g., Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007).

access DS1 and DS3 services, as those services approach the end of their life cycle.⁹ In doing so, such customers find a wide array of alternative sources for Ethernet services—particularly from CLECs and cable companies, as well as ILECs. Indeed, Level 3—one of the CLECs seeking maximum regulation of ILEC Ethernet services in the August 28 Letter—is a larger provider of Ethernet services than both Verizon and CenturyLink.¹⁰

For their part, CLECs rely on a variety of access methods to reach business customers, including building their own facilities, utilizing unbundled loops to provide Ethernet-over-copper, and, purchasing wholesale access from cable companies and other non-ILEC providers. As a CLEC, CenturyLink obtains Ethernet Local Access from a long list of non-ILEC providers to serve locations not on CenturyLink's network.¹¹ CenturyLink has particularly witnessed and benefitted from a recent dramatic upsurge in cable-provided Ethernet access to business locations across the country.¹² Such access offers a robust, completely independent alternative to ILEC Ethernet services and increases pressure on already falling Ethernet prices.

While predicted for some time, cable providers' move up-market into broad wholesale and retail Ethernet offerings is a relatively recent phenomenon. Indeed, Comcast just announced that it has created a new business unit to target large businesses that have multiple locations nationwide.¹³ To facilitate this expansion, Comcast has also signed network agreements with

⁹ See Comments of CenturyLink, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications, et al.* PS Docket No. 14-174, at 10 (filed Feb. 5, 2015) (noting that CenturyLink-provided DS1 special access circuits declined 36 percent from January 2012 to December 2014); Comments of CenturyLink, *Petition for Declaratory Ruling to Clarify That Technology Transitions Do Not Alter, The Obligation of Incumbent Local Exchange Carriers to Provide DS1 and DS3 Unbundled Loops Pursuant to 47 U.S.C. § 251(c)(3), Technology Transitions*, WC Docket No. 15-1 and GN Docket No. 13-5, at 4 (filed Feb. 5, 2015) (CenturyLink Comments on Windstream Declaratory Ruling Petition) (noting forecast that, by 2017, DS1 and Dedicated Internet Access services combined will account for only 3 percent of the broadband marketplace for small and medium businesses).

¹⁰ *Mid-Year 2014 U.S. Carrier Ethernet LEADERBOARD; Port growth unprecedented in the first half of 2015; Mergers may shake up the market by the end of the year* (Aug. 24, 2015), available at <http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/>.

¹¹ CenturyLink Comments on Windstream Declaratory Ruling Petition at 11.

¹² *Id.*

¹³ Comcast Business Press Release, *Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises* (Sept. 16, 2015) (Comcast Press Release), available at <http://corporate.comcast.com/news-information/news-feed/comcast-business-announces-new-unit-targeting-fortune-1000-enterprises>. See also Fierce Telecom, *Comcast Challenges AT&T, Verizon with Multisite Business Division* (Sept. 16, 2015) (“[W]hat’s different about the latest drive is that [Comcast] will offer services to large businesses in and outside of its network

other cable operators to support these national customers.¹⁴ Time Warner Cable, Cox and Charter have also significantly expanded their enterprise data businesses in recent months.¹⁵ It is therefore doubtful that the depth and scope of competition from cable providers are accurately captured in the Commission's collection of data from 2013. Nevertheless, any valid analysis of special access and enterprise broadband services must account for this significant growth in Ethernet access that is completely independent of ILEC networks.

The Joint CLECs ignore all this. They urge the Commission to reinstitute a regulatory scheme dating back to the early 1990s, when ILECs were the only providers of high-capacity data services to most businesses. Among other things, the Joint CLECs urge the Commission to re-impose a productivity factor to reduce prices of special access and enterprise broadband services. Upholding this drastic change in policy would take more than just a better-written order. It would require compelling evidence. Evidence that simply does not exist.

In particular, there is no record evidence that ILEC productivity is increasing, nor does the special access data collection address this issue. At the same time, the Joint CLECs' apparent suggestion that the Commission could establish a productivity factor without "comprehensive" or "concrete" data is misguided to say the least,¹⁶ given the Commission's previous difficulties in sustaining a productivity-based X-Factor. And, even if the Commission had the necessary data, it could not adopt a reliable productivity factor targeted to the special access basket, given the substantial portion of special access costs that are shared with other services.

If anything, one would expect ILEC productivity to be *falling*, given that ILECs' networks now serve less than 40 percent of the access lines they did when the *CALLS Order* was adopted.¹⁷ On top of that, the ongoing technology transition requires ILECs to maintain

area[.]") available at <http://www.fiercetelecom.com/story/comcast-challenges-att-verizon-multisite-business-division/2015-09-16>.

¹⁴ Comcast Press Release at 1, Fierce Telecom, *Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises* (Sept. 16, 2015) available at <http://www.fiercetelecom.com/press-releases/comcast-business-announces-new-unit-targeting-fortune-1000-enterprises>.

¹⁵ See Letter from Curtis L. Groves, Verizon, to Marlene H. Dortch, FCC, Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, RM-10593, at 2-4 (Sept. 24, 2015).

¹⁶ See August 28 Letter at 9-10.

¹⁷ At the end of 2013, ILEC traditional switched access lines had fallen to 66 million, or only 37 percent of lines served at the end of 2000. Compare Industry Analysis and Technology Div., Wireline Competition Bureau, FCC, *Local Telephone Competition: Status as of June 30, 2009* at 12, Table 1 (Sept. 2010), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-301310A1.pdf, with Industry Analysis and Technology Div., Wireline Competition Bureau,

overlapping copper and fiber network facilities in many areas, further eroding their productivity. Thus, to the extent evidence of ILEC productivity exists, it points in exactly the opposite direction the Joint CLECs urge the Commission to go.

The Joint CLECs particularly discount the hurdles the Commission would face in reversing enterprise forbearance and re-imposing price cap regulation of these services. To do so, the Commission would have to follow exacting procedural requirements—including sufficient notice and opportunity for comment, which has not occurred¹⁸—and compile a record sufficient to justify this abrupt change in policy, given the Commission’s earlier factual findings and especially in the face of the substantial reliance costs of the ILECs and their customers.¹⁹ The available record evidence does not come close to doing either.

For all these reasons, the Commission should ignore the Joint CLECs’ ex parte and instead use the evidence gathered in the special access data collection, supplemented with evidence of marketplace developments since 2013, to adopt commonsense rules that account for the ongoing growth in competitive choice for high-capacity business data services.

Pursuant to Section 1.1206(b) of the Commission’s rules, a copy of this ex parte presentation is being filed in the appropriate dockets.

Sincerely,

/s/ Craig J. Brown

FCC, *Local Telephone Competition: Status as of December 31, 2013* at 5 (Oct. 2014) available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-329975A1.pdf.

¹⁸ See Letter from Dianne Griffin Holland and Patrick S. Brogan, United States Telecom Association, to Marlene H. Dortch, FCC, *In the Matter of Technology Transitions, Special Access for Price Cap Local Exchange Carriers, GN Docket No. 13-5 and WC Docket No. 05-25, RM-10593* (Sept. 24, 2015).

¹⁹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (Sup. Ct. 2009); Opposition of CenturyLink, *In the Matters of Special Access for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, at 10-16 (filed Apr. 17, 2013).